

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

STEVEN A. STONE,

Plaintiff,

v.

CREDIT SOLUTIONS CORP.,

Defendant.

**REPORT
and
RECOMMENDATION**

09-CV-281A(F)

APPEARANCES:

GRAHAM AND BORGESE, PC
Attorneys for Plaintiff
FRANK J. BORGESE, of Counsel,
482 Delaware Avenue
Buffalo, New York 14202

DAVID COTTER, ESQ.¹
Credit Solution Corp.,
5454 Ruffin Road, Suite 200,
San Diego, California, 92123

JURISDICTION

This matter was referred to the undersigned for all pretrial matters by Orders of the Hon. Richard J. Arcara filed June 3, 2009 and July 27, 2010 (Doc. Nos. 4, 23). It is presently before the court on Plaintiff's motion, filed April 19, 2011, requesting the case be reopened and entry of judgment to enforce a settlement agreement between the parties ("Plaintiff's motion") (Doc. No. 34).

¹ Defendant's original counsel, Hodgson Russ, L.L.P. withdrew by order dated September 9, 2010 (Doc. No. 25). Mr. Cotter, who serves as Defendant's in-house attorney but has not formally appeared in this matter, participated in two telephone conference calls with the court in an effort to resolve Defendant's alleged non-compliance with the settlement agreement at issue (Doc. Nos. 25, 29).

BACKGROUND AND FACTS²

This action, brought pursuant to the Fair Debt Collections Practices Act, 15 U.S.C. § § 1692, *et seq.* ("FDCPA"), was commenced on March 27, 2009. Defendant initially appeared by Hodgson Russ, L.L.P. and filed its answer on May 27, 2009. Following entry of a Scheduling Order on August 27, 2009 (Doc. No. 8), the parties entered into a settlement agreement ("the agreement" or "the settlement") and filed the agreement under seal (Doc. No. 12) on January 19, 2010. On February 10, 2010, Plaintiff filed a stipulation (Doc. No. 16) withdrawing Plaintiff's motion, filed January 12, 2010 (Doc. No. 10) to approve the settlement ("Plaintiff's motion to approve the settlement"). By order dated February 12, 2010, Judge Arcara approved the parties' stipulation withdrawing Plaintiff's motion to approve the settlement, and dismissed the action on the merits but without prejudice to reopen the action if the settlement was not consummated by May 1, 2010, and closed the case (Doc. No. 18) ("Judge Arcara's Order").

On May 24, 2010, Plaintiff moved to reopen the case for Defendant's failure to consummate the settlement (Doc. No. 19) ("Plaintiff's motion to reopen") and, in accordance with Judge Arcara's direction, filed the settlement agreement under seal (Doc. No. 21).³ Defendant failed to timely respond to Plaintiff's motion to reopen and

² Taken from the pleadings and papers filed in this matter.

³ The initial agreement (Doc. No. 12) was executed by Plaintiff on November 11, 2009 and by Defendant on November 17, 2009 ("the First Settlement Agreement"). A subsequent settlement agreement, filed May 25, 2010 (Doc. No. 21), the subject of Plaintiff's motion to reopen, was executed by Plaintiff on February 26, 2010 and by Defendant on March 10, 2010 ("the Second Settlement Agreement"). The Second Settlement Agreement provides for the same settlement amount as the First Settlement Agreement but modifies the payment schedule required for Defendant and provides for a confession of judgment, a cure procedure, and attorneys' fees in the event of Defendant's failure to make the required payments set forth in the agreement. No confession of judgment has been proffered or filed

on July 27, 2010 Judge Arcara granted Plaintiff's motion to reopen the case and re-referred the matter to the undersigned.

At the court's request, Defendant's in-house counsel, David Cotter, Esq. ("Cotter"), participated on behalf of Defendant in two telephone conference calls regarding the matter with Plaintiff's counsel and court on September 8, 2010 (Doc. No. 25) and September 28, 2010 (Doc. No. 29) during which the parties agreed to discuss a modified payment schedule to facilitate Defendant's compliance with the Second Settlement Agreement in order to avoid further litigation (Doc. No. 29), and a further status conference was scheduled with the court for March 22, 2010. As Plaintiff failed to appear on March 22, 2010, no conference with the parties was conducted and the court issued an order to show cause why the matter should not be dismissed for failure to prosecute (Doc. No. 31). On April 7, 2011, Plaintiff filed his response to the order to show cause (Doc. No. 32) and the order was thereafter vacated on April 11, 2011 (Doc. No. 33). As noted, Plaintiff's motion was filed April 19, 2011 (Doc. No. 34). Defendant was served with Plaintiff's motion and the court's scheduling order by mail service upon Cotter, but to date no response has been filed.

DISCUSSION

It is "well-settled" that a district court may "exercise ancillary jurisdiction to enforce a settlement agreement *only* if the dismissal order expressly retained jurisdiction over that particular agreement, or incorporated into the order." *State Street*

in connection with Plaintiff's instant motion.

House, Inc. v. New York State Urban Development Corporation, 75 Fed.Appx. 807, 2003 WL 22056214, at *810 (2d Cir. Sep't. 3, 2003) (citing *Herrick Co., Inc. v. SCS Communications, Inc.*, 251 F.3d 315, 327 (2d Cir. 2002) (underlying action based on diversity jurisdiction) (italics in original) and *Scelsa v. City University of New York*, 76 F.3d 37, 41 (2d Cir. 1996) (underlying action based on federal claim jurisdiction)). See *Kokkonen v. Guardian Life Inc. Co.*, 511 U.S. 375, 378 (1994) (a claim seeking enforcement of a settlement agreement requires an independent basis for a federal court's exercise of subject-matter jurisdiction). Here, Judge Arcara's Order relating to the Second Settlement Agreement neither "so ordered" the agreement nor incorporated its terms (Doc. No. 18), nor could it have as the agreement was executed well after entry of Judge Arcara's Order. Moreover, as it is apparent from the Complaint, although the parties are diverse (Plaintiff is a New York resident; Defendant is a California corporation), the amount due Plaintiff under the Second Settlement Agreement is far less than \$75,000, as the court's inspection of the agreement filed under seal (Doc. No. 21) reveals. See 28 U.S.C. § 1332(a) (amount in controversy must exceed \$75,000 for action based on diversity of citizenship).

Accordingly, as there is an absence of an independent basis for federal subject matter jurisdiction for the relief now requested by Plaintiff, the court lacks subject matter jurisdiction over Plaintiff's motion seeking to enforce the Second Settlement Agreement and Plaintiff's motion as to such requested relief should therefore be DISMISSED. Plaintiff's request to enforce the Second Settlement Agreement may, however, as a contract claim, be pursued in a state court. See *Kokkonen*, 511 U.S. at 381 (where contract claim for breach of a settlement agreement lacks jurisdictional

basis in federal district court it may be pursued in state court). Further, as Judge Arcara's Order reopened the case and returned Plaintiff's underlying FDCPA action to the court's calendar, Plaintiff's motion to reopen the matter should also be DISMISSED as moot, and the matter should be remitted to the undersigned for entry of a case management order pursuant to Fed.R.Civ.P. 16(b) so that the parties may pursue Plaintiff's FDCPA action through further litigation on the merits.⁴

CONCLUSION

Based on the foregoing, Plaintiff's motion (Doc. No. 34) should be DISMISSED, and the matter remitted to the undersigned for further proceedings.

Respectfully submitted,

/s/ Leslie G. Foschio

LESLIE G. FOSCHIO
UNITED STATES MAGISTRATE JUDGE

Dated: June 21, 2011
Buffalo, New York

⁴ Defendant is reminded that a corporation may not proceed in federal court except by counsel. See *Rowland v. California Men's Colony, Unit II Men's Advisory Council*, 506 U.S. 194, 201-02 (1993); *Grace v. Bank Leumi Trust Co. of New York*, 443 F.3d 180, 192 (2d Cir. 2006). As Cotter is not admitted in this court he must apply to proceed *pro hac vice*, Local R.Civ.P. 83.1(c), or Defendant should retain counsel who is admitted in this court.

Pursuant to 28 U.S.C. §636(b)(1), it is hereby

ORDERED that this Report and Recommendation be filed with the Clerk of the Court.

ANY OBJECTIONS to this Report and Recommendation must be filed with the Clerk of the Court within fourteen (14) days of service of this Report and Recommendation in accordance with the above statute, Rules 72(b), 6(a) and 6(e) of the Federal Rules of Civil Procedure and Local Rule 72.3.

Failure to file objections within the specified time or to request an extension of such time waives the right to appeal the District Court's Order.

Thomas v. Arn, 474 U.S. 140 (1985); *Small v. Secretary of Health and Human Services*, 892 F.2d 15 (2d Cir. 1989); *Wesolek v. Canadair Limited*, 838 F.2d 55 (2d Cir. 1988).

Let the Clerk send a copy of this Report and Recommendation to the attorneys for the Plaintiff and the Defendant.

SO ORDERED.

/s/ Leslie G. Foschio

LESLIE G. FOSCHIO
UNITED STATES MAGISTRATE JUDGE

DATED: June 21, 2011
Buffalo, New York